

APR - 5 2006 *MP*

**MARY L.M. MORAN**  
**CLERK OF COURT**

**DISTRICT COURT OF GUAM**  
**TERRITORY OF GUAM**

10 JOSEPH ASANO QUENGA,

11 Petitioner,

12 vs.

UNITED STATES OF AMERICA,

Respondent.

Criminal Case No. 00-00134

Civil Case No. 05-00024

**ORDER**

15 The Court is in receipt of Petitioner Joseph Quenga's ("Quenga") petition for  
16 postconviction relief filed July 26, 2005. The Court deems the matter appropriate for decision  
17 without oral argument. FED. R. CIV. P. 78. Quenga claims that his sentence was  
unconstitutionally enhanced in light of the recent Supreme Court decision *United States v.*  
*Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005). He further asserts that his trial and appellate  
counsel were ineffective for failing to object to or raise the issue before the trial and appellate  
courts. After careful consideration of the matter, the Court finds no basis for the relief as  
requested and DENIES Quenga's motion.

**BACKGROUND**

On November 21, 2000, Quenga pled guilty to one count of Felon in Possession of a  
Firearm, in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). At the time of his plea, Quenga  
stipulated to facts contained in his plea agreement that:

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<sup>1</sup> Quenga's petition is entitled "Petition Pursuant to 28 U.S.C. § 1651 All Writs Act, 28 U.S.C. § 2255, Extraordinary Writs of Error Coram Nobis/Audita Querela Habeas Corpus 28 U.S.C. § 2241." *See*, Docket No. 31. Quenga also submitted a document entitled "Motion to Amend on December 5, 2005. Docket No 37. All submissions will be collectively dealt with and referred to as "motion."

**ORIGINAL**

1 On August 30,2000, the Guam Police Department and the  
2 Violent Street Crime Task Force executed a search warrant at the  
3 defendant's residence. The officers found six firearms in the  
4 defendant's residence. One of the firearms, a black .9mm Intratec  
5 assault-pistol, model TEC-DC9, Serial Number D070126 was  
6 found in the defendant's bedroom.

7 On August 30,2000, the defendant had been convicted of  
8 the following felony offenses: three counts of Burglary (Each as  
9 a 2<sup>nd</sup> Degree Felon) and two counts of Possession of a Firearm  
10 Without an Identification Card (Each as a Felony) on April 27,  
11 1992, under Criminal Number CF094-91, [i]n the Superior Court  
12 of Guam, and two counts of Burglary (Each as a 2<sup>nd</sup> Degree  
13 Felony) on April 27, 1992, under Criminal Number CF094-91,<sup>2</sup>  
14 [i]n the Superior Court of Guam[.]

15 Plea Agreement at ¶ 7.

16 On July 31,2002, the Court sentenced Quenga to one hundred seventy-four(174) months  
17 imprisonment. The judgment of conviction was entered on the docket on August 8,2002. On  
18 August 12,2002, Quenga's counsel filed a notice of appeal with the Ninth Circuit on Quenga's  
19 behalf. In November, 2002, Quenga's counsel filed a "Motion to Withdraw Appeal" signed by  
20 himself and Quenga. Grounds for withdrawal stated that "[t]his request is being made after a  
21 thorough review of the pleadings, transcripts and the case file. The Defendant in consultation  
22 with his counsel has determined that there are no non-frivolous appeal issues which could be  
23 appropriately presented to the court." On November, 25, 2002, the Ninth Circuit Court of  
24 Appeals ("Ninth Circuit") granted Quenga's motion and dismissed his appeal. United States v.  
25 Joseph Asano Quenga, 02-10426, D.C. No. CR-00-00134 (9<sup>th</sup> Cir. November 25, 2002). Docket  
26 No. 30. His conviction became final on February 24,2003. Quenga, *pro se* and incarcerated,  
27 brought this motion requesting the Court to vacate his sentence. See Docket Nos. 31 and 37

### 28 ANALYSIS

Quenga seeks habeas relief alleging that his sentence was unconstitutionally enhanced  
and therefore invalid. Quenga brings this petition offering several different jurisdictional  
theories including 28 U.S.C. § 1651 (writ of *Coram Nobis* or *Audita Querela*), 28 U.S.C. § 2241  
and 28 U.S.C. § 2255.

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<sup>2</sup> Closer review of the record and the Presentence Report, reveals that these two convictions were obtained under Guam  
Superior Court file number CF 150-91. The Court notes that ¶ 8 of the plea agreement confirms this fact, as Quenga  
acknowledged that the government would seek enhancements of his sentence utilizing the convictions that he stipulated to in  
¶ 7.

1 Quenga's claims are not cognizable as a either writ of ~~corim~~ nobis or audita querela.

2 Writs of *corim nobis* and *audita querela* are only available to the extent that they fill  
3 "gaps" in the current system of post-conviction relief. *United States v. Valdez-Pacheco* 237 F.  
4 3d 1077 (9<sup>th</sup> Cir. 2001). Writs of *corim nobis* and *audita querela* are a valid form of collateral  
5 attack apart from and in addition to § 2255 proceedings. *See United States v. Morgan*, 346 U.S.  
6 502, 74 S. Ct. 247 (1954) (citing *United States v. Hayman*, 342 U.S. 205, 219, 72 S.Ct. 263,  
7 272). However, "a federal prisoner may not challenge a conviction or sentence by way of a  
8 petition for a writ of *audita querela* [and by extension *corim nobis*] when that challenge is  
9 cognizable under § 2255 because, in such a case, there is no 'gap' to fill in the postconviction  
10 remedies." *Valdez-Pacheco* 237 F. 3d at 1080. Writs of *corim nobis* and *audita querela* are a  
11 form of **collateral review** that is an extraordinary remedy to be employed by the courts "only  
12 under circumstances compelling such action to achieve justice." *Morgan*, 346 U.S. at 511  
13 (emphasis added).

14 Quenga cannot challenge his sentence pursuant to a petition for a writ of error *coram*  
15 *nobis* or *audita querela* because he is still in custody. *See* 28 U.S.C. § 2255; *Matus-Leva v.*  
16 *United States*, 287 F.3d 758, 761 (9<sup>th</sup> Cir. 2002) (deciding that a writ of *coram nobis* was  
17 unavailable to a defendant who was still in custody and could seek relief pursuant to a § 2255  
18 motion). Even though Quenga has failed to timely file his §2255 motion, he "may not resort to  
19 *coram nobis* merely because he has failed to meet the AEDPA's gatekeeping requirements." *Id.*

20 Due to the nature of the allegations and the type of relief requested, Quenga's petition is  
21 more properly brought under § 2255. Additionally, the Court finds that Quenga has failed to  
22 provide sufficient facts that would compel the court to utilize such an extraordinary remedy in  
23 order to "achieve justice."

24 Quenga's petitions are not properly brought under 28 U.S.C. § 2241.

25 A federal prisoner authorized to seek relief under § 2255 may seek relief under § 2241  
26 if he can show that the remedy available under § 2255 is "inadequate or ineffective to test the  
27 validity of his detention." *Hernandez v. Campbell*, 204 F.3d 861,864-5 (9<sup>th</sup> Cir. 2000); *United*  
28 *States v. Pirro*, 104 F.3d 297,299 (9<sup>th</sup> Cir. 1997) (quoting § 2255). The Ninth Circuit has

1 recognized that it is a very narrow exception. *Id. Ivy v. Pontesso*, 328 F.3d 1057 (9<sup>th</sup> Cir. 2003)  
2 (a petitioner must show actual innocence *and* that he never had the opportunity to raise it by  
3 motion to demonstrate that § 2255 is inadequate or ineffective); *Aronson v. May*, 85 S.Ct. 3, 5  
4 (1964) (a court's denial of a prior § 2255 motion is insufficient to render § 2255 inadequate);  
5 *Loretsen v. Hood*, 223 F.3d 950,953 (9<sup>th</sup> Cir. 2000) (same); *Tripati v. Henman*, 843 F.2d 1160,  
6 1162-63 (9<sup>th</sup> Cir. 1988) (a petitioner's fears of bias or unequal treatment do not render a § 2255  
7 petition inadequate); *Williams v. Heritage*, 250 F.2d 390 (9<sup>th</sup> Cir. 1957); *Hildebrandt v. Swope*,  
8 229 F.2d 582 (9<sup>th</sup> Cir. 1956); *see United States v. Valdez-Pacheco*, 237 F.3d 1077 (9<sup>th</sup> Cir. 2001)  
9 (procedural requirements of § 2255 may not be circumvented by invoking the All Writs Act, 28  
10 U.S.C. § 1651). The burden is on Quenga to show that the remedy is inadequate or ineffective.  
11 *Redfield v. United States*, 315 F.2d 76, 83 (9<sup>th</sup> Cir. 1963).

12 In this case, Quenga's direct challenge to his sentence is inappropriately raised in a  
13 petition filed pursuant to § 2241. Quenga states that he seeks relief pursuant to § 2241 because  
14 he "is unable to use § 2255 because in his case it has been rendered inadequate or ineffective."  
15 (Motion at 8, Docket No. 31.) However, Quenga has provided no facts or circumstances  
16 showing that § 2255 is either inadequate or ineffective other than to indicate that he is barred  
17 from filing by the statute of limitations. Quenga has not shown that he did not have an  
18 opportunity to present his claim in a prior § 2255 motion. Indeed, Quenga does not allege that  
19 he has ever attempted to proceed via § 2255 during the nearly two and one-half years that have  
20 elapsed since his conviction became final in February 2003.

21 Quenga's remedy under § 2255 is not rendered inadequate or ineffective because he  
22 cannot meet the strict procedural requirements for filing a § 2255 petition. *Moore v. Reno*, 185  
23 F.3d 1054, 1055 (9<sup>th</sup> Cir. 1999). Similarly, § 2255 is not inadequate or ineffective merely  
24 because a particular petitioner's § 2255 motion is procedurally barred. *Id.* at 1055. Further, §  
25 2255 is not inadequate or ineffective because a petitioner misses the statute of limitations. *Id.*  
26 *See also, Ferguson v. Palmateer*, 321 F.3d 820,823 (9<sup>th</sup> Cir. 2003) (holding that AEDPA's one-  
27 year statute of limitations, even if in tension with a longer state statute of limitations, does not  
28 render federal habeas an inadequate or ineffective remedy). Accordingly, the Court finds that

1 despite the potential time bar with regard to Quenga's filing a § 2255 petition, § 2255 still  
2 remains an adequate and effective remedy to test the legality of Quenga's detention.

3 **Quenga's claims under 28 U.S.C. § 2255.**

4 Title 28 United States Code Section 2255 allows persons in federal custody to collaterally  
5 challenge the constitutionality, legality or jurisdictional basis of the sentence imposed by a court.<sup>3</sup>  
6 See, *United States v. Addonizio*, 442 U.S. 178, 185, 99 S. Ct. 2235, 2240 (1979). Since such a  
7 challenge calls into question a conviction's finality, collateral relief is an extraordinary remedy  
8 that should only be granted when a fundamental defect could have resulted in a complete  
9 miscarriage of justice, or the rudimentary rules of fair procedure were not followed. *United*  
10 *States v. Timmreck*, 441 U.S. 780, 783, 99 S. Ct. 2085, 2087 (1979).

11 Quenga claims that he is entitled to relief for the following reasons: 1) his sentence was  
12 improperly enhanced in light of *United States v. Booker*, 125 S.Ct. 738 (2005); 2) trial counsel  
13 was ineffective because counsel failed to address the issues raised in one above and 3) counsel  
14 on appeal was ineffective for failing to continue with Quenga's appeal regarding number one  
15 above.

16 Quenga's motion is untimely. The Antiterrorism and Effective Death Penalty Act of  
17 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, imposes a strict one-year  
18 limitation concerning the time frame within which a prisoner may bring a motion to vacate, set  
19 aside, or correct his sentence under that section. The one-year period runs from "the latest" of  
20 the events enumerated as follows:

21 (1) the date on which the judgment of conviction becomes final;

22 (2) the date on which the impediment to making a motion created  
23 by governmental action in violation of the Constitution or laws of  
24 the United States is removed, if the movant was prevented from  
making a motion by such governmental action;

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25 <sup>3</sup> The statute states, in pertinent part:

26 A prisoner in custody under sentence of a court established by Act of Congress  
27 claiming the right to be released upon the ground that the sentence was imposed in  
violation of the Constitution or laws of the United States, or that the court was without  
28 jurisdiction to impose such sentence, or that the sentence was in excess of the maximum  
authorized by law, or is otherwise subject to collateral attack, may move the court  
which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

1 (3) the date on which the right asserted was initially recognized  
2 by the Supreme Court, if that right has been newly recognized by  
3 the Supreme Court and made retroactively applicable to cases on  
4 collateral review; or

5 (4) the date on which the facts supporting the claim or claims  
6 presented could have been discovered through the exercise of due  
7 diligence.

8 *Id.*

9 Here, if Quenga was to seek relief pursuant to § 2255 subsection (1), he would have had  
10 to do so within one year of February 24, 2003, when his judgment became final. However, as  
11 noted, Quenga did not file his motion until July 26, 2005, approximately one year and five  
12 months after the statute of limitations had expired. Accordingly, Quenga is barred from relief  
13 under subsection (1). Quenga therefore needs to establish that one of the conditions presented  
14 in subsections (2) through (4) occurred within the year preceding the filing of the instant motion.  
15 In other words, for the motion to be timely filed, one of the events in subsections (2), (3) or (4)  
16 must have occurred on or after July 26, 2004.

17 Quenga fares no better under subsections (2) through (4) as he fails to provide sufficient  
18 bases within the enumerated criteria. For example, in order to seek relief under subsection (2)  
19 Quenga would need to show the removal of a governmental action that previously impeded his  
20 seeking relief under § 2255. Quenga's motion makes no mention of any such removal.  
21 Accordingly, subsection (2) does not apply. Likewise, Quenga fails to provide any facts or  
22 argument that provide him relief under subsections (3) and (4). Although Booker is a Supreme  
23 Court decision, it has not been made retroactively applicable to cases on collateral review (3).<sup>4</sup>  
24 Nor is Quenga's claim supported by "newly discovered" facts as required in subsection (4).  
25 Again, because none of the four enumerated events occurred within one year prior to Quenga's  
26 motion being filed, the motion is untimely unless Quenga can demonstrate that an equitable  
27 tolling is warranted.

28 Equitable tolling of AEDPA's statute of limitations is "unavailable in most cases" and  
permissible only if "extraordinary circumstances beyond a prisoner's control make it impossible

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<sup>4</sup> Justice Breyer in the *Booker* decision expressly stated that *Booker* applied only "to all cases on direct review." 125 S. Ct. at 769. Further, the Ninth Circuit, addressing this same issue of retroactive application, has held that *Booker* does not apply retroactively to cases on collateral review. See *United States v. Cruz*, 423 F.3d 1119, 1120 (9th Cir. 2005).

1 to file a petition on time." *Miranda v. Castro*, 292 F.3d 1063, 1066 (9<sup>th</sup> Cir. 2002) (citations  
2 omitted). The burden is on the petitioner to show that the exclusion applies and that the  
3 "extraordinary circumstances" alleged, rather than a lack of diligence on his part, were the  
4 proximate cause of his untimeliness. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9<sup>th</sup> Cir. 2003);  
5 *Stillman v. LaMarque*, 319 F.3d 1199, 1203 (9<sup>th</sup> Cir. 2003).

6 Quenga has failed to provide this Court with any information that would support the  
7 existence of such "extraordinary circumstances." His withdrawal of his appeal occurred in  
8 November 2002, over two and one-half years before he filed his petition. Even if he waited for  
9 a period of time for his counsel to "re-initiate" his appeal, Quenga has not demonstrated that he  
10 made any inquiries as to the reason for delay or even attempted to contact counsel. The Court  
11 finds that the amount of time that passed between the withdrawal and the filing of Quenga's  
12 petition demonstrated a lack of diligence on the part of Quenga. This lack of diligence was the  
13 proximate cause of his untimeliness. Accordingly, the Court finds Quenga's petition is untimely  
14 filed and barred by AEDPA's statute of limitations.

15 Procedural Bar. Assuming Quenga's Petition is timely filed, the Court considers  
16 whether Quenga's petition is procedurally barred. Quenga concedes that he failed to advance  
17 the instant claims in the district court prior to judgment in the criminal case and also failed to  
18 raise his claims on direct appeal. Claims not asserted previously, although available, are  
19 procedurally barred absent a showing of cause and actual prejudice. *United States v. Frady*, 456  
20 U.S. 152, 166 (1982). "Where a defendant has procedurally defaulted a claim by failing to raise  
21 it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate  
22 either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley v. United States*,  
23 523 U.S. 614, 622 (1998).

24 Admittedly, Quenga did not bring this matter before either the trial/sentencing court or  
25 appellate court. However, Quenga alleges the reason he did not address it previously was due  
26 to ineffective counsel. See, *Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("[i]neffective  
27 assistance . . . is cause for a procedural default"). Accordingly, the Court will consider Quenga's  
28 claims in that context.



1        Ineffective Assistance of Counsel Claims. To demonstrate ineffective assistance of  
2 counsel, Quenga must show both that his counsel's performance was deficient and that the  
3 deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687  
4 (1984). A petitioner fulfills the first prong of the Strickland test by showing that "the behavior  
5 complained of falls below prevailing professional norms." *United States v. McMullen*, 98 F.3d  
6 1155, 1158 (9<sup>th</sup> Cir. 1996). An inquiry into counsel's conduct probes "whether counsel's  
7 assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. In  
8 engaging in such an inquiry, the court "must indulge a strong presumption that counsel's conduct  
9 falls within the wide range of reasonable professional assistance" especially where counsel's acts  
10 may be considered "'sound trial strategy.'" *Id.* at 689.

11        Booker Claims. Quenga claims that trial/appellate counsel provided ineffective  
12 assistance of counsel by failing to raise the issue that Quenga's sentence was improperly  
13 enhanced in violation of Booker. Quenga contends that the Court unlawfully utilized prior  
14 convictions without them actually having been proven beyond a reasonable doubt to a jury .

15        Because Quenga's conviction and sentence were final on or about February 24, 2003,  
16 when Booker was decided, Booker is only applicable if it applies retroactively to cases on  
17 collateral review. The Ninth Circuit has expressly held that Booker was not retroactive to cases  
18 on collateral review. *United States v. Cruz*, 423 F.3d 1119, 1120 (9<sup>th</sup> Cir. 2005). Accordingly,  
19 Quenga's claim in this regard is foreclosed.

20        Assuming that Booker should be applied retroactively to Quenga's case, Quenga bears  
21 the burden of demonstrating that, under the circumstances, counsel's decision not to challenge  
22 the enhancement of his sentence on this ground was objectively unreasonable, and that he was  
23 prejudiced as a result. See *Strickland*, U.S. 466 U.S. at 687-88. Quenga was sentenced to 174  
24 months for pleading guilty to being a felon in possession of a firearm. Quenga's sentence was  
25 six months less than the statutory minimum required for an enhanced penalty under 18 U.S.C.  
26 § 924(e)(1). The enhancement was based on his prior violent felony convictions. Quenga's  
27 claim is foreclosed by *United States v. Quintana-Quintana*, 383 F.3d 1052 (9<sup>th</sup> Cir. 2004) (order)  
28 (observing that Blakely preserved the rule that a sentencing enhancement based on a prior



1 conviction need not be presented to a jury). This exception for prior convictions is reiterated in  
2 *Booker*. Under *Booker*, "[a]ny fact, (**other than a prior conviction**) which is necessary to  
3 support a sentence exceeding the maximum authorized by the facts established by a plea of guilty  
4 or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable  
5 doubt." (emphasis added). 543 U.S. at 244.

6 Even if the exception in *Booker* didn't apply, the record supports the Court's decision to  
7 enhance Quenga's sentence based on the prior convictions. Quenga has specifically stated that  
8 he is not challenging the validity of his plea or his conviction. See Motion at 5. Docket No. 31.  
9 Quenga clearly stipulated to all of the prior convictions that were utilized to enhance his sentence  
10 within the plea agreement itself. See Plea at ¶ 7. Quenga also acknowledged these convictions  
11 a second time, when he was placed on notice that the Government would seek to utilize these  
12 same convictions to enhance his sentence. *Id.* at ¶ 11. As such, at sentencing, the Court did not  
13 have to determine the existence of prior convictions, since this fact had already been established  
14 by Quenga's own admission in the plea agreement and at the guilty plea hearing. Nothing in  
15 the record indicates that the enhancement was improperly applied, hence *Booker* is not violated.

16 Trial/appellate counsel does not have a constitutional duty to raise every issue requested  
17 by the defendant and may weed out weak issues. See *Jones v. Barnes*, 463 U.S. 745, 751-54, 103  
18 S.Ct. 3308 (1983); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9<sup>th</sup> Cir. 1997). Quenga would  
19 have had an insufficient factual basis to support the claim that the enhancement was improper.  
20 Based on the evidence as a whole, it cannot be said that counsel's decision not to challenge  
21 application of the armed career criminal enhancement fell outside the wide range of reasonable  
22 professional assistance. *Strickland*, U.S. 466 U.S. at 688-89. Likewise, because *Booker* was  
23 not violated, Quenga cannot demonstrate any resultant prejudice. Accordingly, the Court finds  
24 Quenga's claims that the precepts of *Booker* were violated in imposing his sentence and that his  
25 counsel was ineffective in this regard, are equally without merit. Quenga's requests with respect  
26 to these claims are denied.

27 Quenga's Withdrawal of Appeal. Quenga claims that he was "coerced" by his counsel  
28 to sign the request to withdraw his direct appeal. Quenga asserts that counsel urged him to "just

1 sign the withdraw[al] for now," leading him to believe "counsel would prepare the appeal briefs  
2 at a later date." See Quenga's Reply to Government's Opposition ("Reply") at 2. Docket No.  
3 34. Quenga contends that counsel's statement subjected him to coercion, undue influence, fraud  
4 and duress rendering his agreement to withdraw his appeal involuntary.

5 Quenga claims that counsel's statement is tantamount to failing to file a notice of appeal  
6 at all and should be governed by the mandates of *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct.  
7 1029 (2000). However, the Court finds *Roe* inopposite to the case at bar. In *Roe*, counsel failed  
8 to file a timely notice of appeal despite the request of the his client to do so. Here, counsel did  
9 timely file the notice, however submitted a motion to withdraw the appeal seemingly with  
10 Quenga's consent some three months later. Quenga asserts that counsel should have filed a "no  
11 merit brief" and sought to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct.  
12 1396, (1967). However, Quenga fails to acknowledge that a motion to voluntarily dismiss the  
13 appeal is a valid option for an appellant pursuant to FED. R. APP. P. 42(b) and 9<sup>th</sup> CIR. R. 27-9.1.<sup>5</sup>

14 Quenga's motion to withdraw his appeal specifically states "[t]he defendant in  
15 consultation with his counsel has determined that there are no non-frivolous appeal issues which  
16 could be appropriately presented to the Court." See Attachment to Docket No. 31. This language  
17 is simply worded and unambiguous. Quenga affixed his signature to this pleading thereby  
18 attesting to its assertions. Quenga does not dispute signing the motion. Rather, he asserts that  
19 despite the plain language of the document he believed that his appeal would continue. The  
20 amount of delay by Quenga in bringing the instant petition and the record in this matter indicate  
21 to the contrary. The Court finds even assuming that the statements allegedly made by counsel  
22 occurred, those statements do not rise to the level of coercion, duress, fraud or undue influence.  
23 Counsel's use of such language in speaking with Quenga did not fall outside the wide range of  
24 reasonable professional assistance.

25 Even if counsel's performance did amount to coercion in procuring Quenga's consent to  
26 withdraw the appeal, to the extent that Quenga is in fact collaterally attacking his sentence by  
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28 <sup>5</sup> See also *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 108 S.Ct. 1895 (1985) in its decision the  
Court acknowledged three options available to the appellant if counsel determines the appeal to be frivolous, 1) voluntarily  
dismiss the appeal; 2) he could go forward without a lawyer; or 3) he could proceed and counsel would be required request to  
withdraw from the case and to inform the court of the strongest arguments the lawyer could make in support of the appeal but  
would also advise the court of the lawyer's conclusion that the appeal is frivolous. *Id.* at 431.

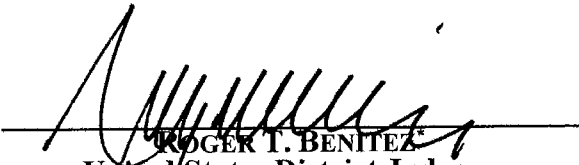
1 alleging the ineffective assistance of counsel on appeal, he must not only show that the conduct  
2 of counsel was outside the wide range of professionally competent assistance, but also must  
3 show prejudice because of the actions of counsel. *Strickland*, 466 U.S. at 687-90; *Denham v.*  
4 *Deeds*, 954 F.2d 1501, 1505 (9<sup>th</sup> Cir. 1992).

5 Quenga has failed to demonstrate how he was prejudiced by the withdrawal of his appeal.  
6 Quenga asserts only a preclusion from a Booker claim in support his claim of prejudice. Any  
7 ineffective assistance did not prejudice Quenga in a legal sense. His arguments regarding his  
8 Booker claim have been considered by this court and rejected on their merits. Because Quenga  
9 has not shown that his failure to appeal was due to counsel's ineffectiveness, Quenga has not  
10 established cause for his failure to raise his sentencing claims on appeal.

11 **CONCLUSION**

12 The Court has reviewed each of the issues raised by Quenga and finds that the records  
13 of the case conclusively show that Quenga is not entitled to relief. Accordingly, Quenga's  
14 motion for relief is DENIED.

15  
16 **IT IS SO ORDERED** this 5 day of April, 2006.

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19   
20 **ROGER T. BENITEZ\***  
21 **United States District Judge**

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\* The Honorable Roger T. Benitez, United States District Judge for Southern California, sitting by designation.